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JMH/CW/LB/3

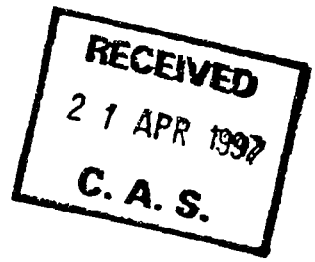
Commissioner's File: CIS/14591/96

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER



Name:

Social Security Appeal Tribunal:

Case No:

1. My decision is that the decision of the tribunal was erroneous in point of law. I set it aside, and in pursuance of the powers on that behalf contained in section 23(7) Administration Act 1992, I substitute my own decision. As at 28.11.95, the claimant was habitually resident in the UK and the assessment of his applicable amount at nil was therefore incorrect. Thus from then his applicable amount should be assessed in the normal way.

2. This is an appeal from the decision of a SSAT dated 21.3.96. I see it is brought with leave granted by me. The claimant entered the UK - not as will appear for the first time - on 25.11.95 and claimed income support on 28.11.95. The AO decided that the claimant was not habitually resident in the UK and, therefore, his applicable amount was, in accordance with regulation 21(3), and para 17 of the seventh schedule to, the General Regulations, nil. From that decision the claimant appealed to the SSAT to determine that on the date they sat - some 4 months later - the claimant was not habitually resident in the UK and therefore disallowed the appeal.

3. This case raises a point of some importance, namely whether, and if so how far, a previous period of residence in the UK can, in respect of a later period of residence, count towards the satisfaction by a claimant of the test that he is now habitually resident in the UK. The appeal is supported by the AO, who asked me to substitute my own decision in the sense that I have.

4. I now turn to the facts of the case.

(i) The claimant is now aged 67. He is Indian by birth but has British Overseas Citizens status. He is married, he has sons, the youngest of whom is called "Harinder", by which name I shall refer to him in this decision. Of the sons, it is only with Harinder that I am concerned.

(ii) The claimant first came to the UK with his wife in 1978 in order to attend Harinder's first wedding. They stayed for approximately 12 months, returning to India in 1979.

(iii)In 1992, Harinder's marriage ran into difficulties and divorce proceedings were brought. The claimant and his wife wished to support Harinder during his crisis, and came over to the UK, both for that purpose, and because the claimant's wife was then ill and he thought she would receive better treatment here. On that occasion, the claimant and his wife entered the UK on 2.4.92 and returned to India on 3.4.93. During the period 2.4.92 to 15.3.93, the claimant claimed and was paid income support.

As I understand it, the claimant's representative is not placing much weight on these two periods of residence, and, having regard to the strictly limited purposes of both visits, it seems difficult to argue otherwise.

(iv) While still in the UK Harinder apparently indicated to his parents that he would wish to remarry, but would prefer a bride who had been born and brought up in India. On 2.4.93, his divorce was made absolute. On 3.4.93 - or possibly 4.4.93, it matters not which - the claimant and his wife flew to India to arrange a marriage for Harinder. They saw a number of prospective brides and chose one. Harinder then flew to India and on 30.4.93 married the bride chosen by his parents. He returned to the UK by himself one week later.

(v) The claimant and his wife returned to the UK on 20.6.93. In presenting his case to the tribunal, the claimant's representative stated that "the thrust of the case is that the decision [the claimant] would live here [i.e. in the UK] was taken in June 1993". The claimant claimed and was paid income support from 21.6.93.

(vi) On 1.8.94, the law relating to income support in respect of persons from abroad was changed and the test of habitual residence introduced.

(vii) Things, however, did not go smoothly. Harinder's new wife was refused an entry visa to the UK. She was upset and, at Harinder's request, the claimant and his wife returned to India on 11.10.94 to stay with her until such time as clearance was given. I would point out however it could not at that time be predicated that clearance would in fact ever be given. However, before the claimant left he wrote a letter dated 11.10.94 to the Benefit Agency, to be found at p26, in these terms:

> "Dear Sir/Madam.
>
> Please note my partner and I are going abroad today 11 October 94. So I am therefore returning you the Allowance Book Vouchers dated 17 October to 5 December 94.
>
> I will get in touch with you if and when I return to Great Britain."

The last words may, at first sight, seem odd in the mouth of one who had apparently already evinced an intention permanently to reside in the UK. I do not know the circumstances in which that letter was written. It seems to me it was almost certainly written in a different hand to that of the claimant, and I would not place too much reliance on it.

(viii) After an appeal, clearance was given for Harinder's new wife to come to the UK. This took some time and the claimant together with his wife and Harinder's new wife did not enter the UK until 25.11.95. The claimant made a claim for income support on 28.11.95, the history of which can be seen above.

5. In reaching their decision, the tribunal placed great emphasis on the absence from the UK of the claimant and his wife for some 11 months between 11.10.94 and 20.11.95. In their reasons (p60) they said:

> "It seems to us that by staying away from the UK for about 13 months [in fact 11 months] any period of residence here which [the claimant] was setting up was broken by the lengthy duration of his stay in India. Accordingly we have to look at a fresh period commencing on his return in November 1995. The Commissioner indicates [see para 28 of CIS/1067/95] that for a person in [the claimant's case] we should be looking at 12 months or so of actual residence in this country of a settled and viable nature before it could be said that he had become an habitual resident of this country. As the period is about 4 months we do not think that an intention to reside here permanently can be shown. Habitual residence is therefore not established and the appeal does not succeed."

They then went on to say (p61):

> "We have not considered the practicability of [the claimant's] arrangements for his residence because the first hurdle of establishing a sufficient period of residence in the UK has not been overcome."

In the chairman's note of evidence there appear the following recorded statements:

> "Presenting Officer...If the son is willing to maintain his parents then do they intend to pursue the claim for income support?
>
> Representative: The son means he is willing to look after them and give them a roof over their head.
>
> [Harinder]: I do mean that I will look after them and keep them in my house.
>
> Mr Fox: Is this free of charge?
>
> [Harinder]: I don't charge them, I never asked them for any money for this. I pay for all the food electric and gas. I never had to pay any bills when I stayed in India.
>
> Mr Fox: What are you doing with your pension?
>
> The claimant: I buy clothes, drinks, spending money for myself and wife."

I should add at this stage that the claimant had a work pension of £227.87 per calendar month.

6. I now turn to the law. "Habitual residence" is not synonymous with "ordinarily resident". The authorities lay considerable stress and necessity for "an appreciable period" of residence to elapse before it can be said that a claimant is now habitually resident here. I quote from the opinion of Lord Brandon in re J 1990 2 AC 562 at pps.578/9:

> "The first point is that the expression "habitually resident"...is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contained. The second point is that the question of whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may

> cease to be habitually resident in country A on a single day if he or she leaves it without a settled intention not to return to it but to take up long term residence in country B instead. Such a person cannot however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B."

7. In para 28 of CIS/1067/95, the Commissioner suggested some time scales as possible rough guides, but I do not think that he was, as it were, attempting or intending to lay down any "tariff", and the dangers of so doing were pointed out by another Commissioner in para 24 of CIS/2326/95. As Lord Brandon said in the passage I have quoted above it "is a question of fact to be decided by reference to all the circumstances of any particular case".

8. It seems to me, therefore, that the statement by the tribunal that they should be looking at a period of 12 months or so of actual residence that 4 months was by itself probably unsound in law. However, for the purposes of argument let me assume that the tribunal were perfectly justified, if the 4 month period of residence had stood alone, in holding that the claimant had not then achieved habitual resident status, a conclusion which would be far from impossible. Let me then ask the question, "What relevance, if any, did the period of residence in the UK from 20.6.93 to 11.10.94 have on the question of habitual residence as at any date from 25.11.95 (the date on which the claimant re-entered the UK) up to and including 21.3.96, the date of the tribunal hearing?".

It is my normal practice to fight shy of any attempt to answer any hypothetical question. My duty is to decide any particular case by reference to the facts and parameters of that case alone. But I am satisfied that the question I have asked is not a question which is purely hypothetical or, as it were asked, in vacuo, but a serious question which I have to answer in order to determine this case.

9. As Lord Brandon said in re J:

> "A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country B instead".

It seems to me therefore that if the claimant had achieved habitual residence status by 11.10.94, he would not have lost it had he, throughout the period of his absence in India, retained a settled intention to reside in the UK permanently, and his absence from the UK was at all times intended to be temporary. In this case, the reason why the claimant and his

wife returned to India on 11.10.94 was to give support to Harinder's new wife until clearance was, if indeed it ever was, obtained. It seems to me that the purpose was to bring Harinder's new wife over as soon as possible and it seems to me that the claimant and his wife retained a settled intention to reside permanently in the UK. A question which could be asked is: "Would they have gone back to India if the problem regarding the new wife's visa had not arisen?".

I can only think that the answer to that question is "no".

10. In CIS/1067/1995, the Commissioner held that an absence from the UK for a month did not prejudice the status of the claimant in that case as being habitually resident in the UK. The length of time in this case is considerably longer but it seems to me that the reason for that lay principally in the difficulties of obtaining an entry visa for the new wife into the UK. By the same token, there must come a time when prolonged absence abroad must justify an inference that an intention to return is no longer held and the claimant would not be habitually resident in the UK had he or she later returned. That, however, is a matter of fact to be decided in the particular circumstances of each case. It seems to me that in this case the purpose of going to India was to support the new wife the settled intention of returning never having been lost. Accordingly it seems to me that the period of residence from 20.6.93 to 11.10.94 is relevant for the purpose of determining whether the claimant was habitually resident in the UK, and it follows that, if he did not lose their status, he retained it and remained habitually resident and he would have been habitually resident therefore on the date of his claim viz 28.11.95.

11. A point however which troubles me is that the tribunal made no finding of fact that the claimant was in fact habitually resident in the UK immediately before his departure therefrom on 11.10.94. However, the AO asks me to infer that he was, having regard to the fact that the claimant had made a decision in 1993 to reside permanently in the UK and the fact that his absences since that time have been fully explained. He also relies on the two earlier periods of residence in this country viz 1978 to 1979 and 2.4.92 to 3.4.93 but for reasons I have indicated above, I do not consider those periods relevant. I think that is a request to which I can properly defer.

12. Finally, I should shortly address the question of viability. In agreement with the Commissioner in para 28 of CIS/2326/95, I regard the question of whether residence is viable in the UK without recourse to national funds one factor only, and not by itself decisive. But in any event, the evidence in this case is (i) that the claimant was by no means entirely destitute since he had a work pension of £227.87 per calendar month which would have the effect of reducing his applicable amount fairly substantially; and (ii) that Harinder

gave evidence to the tribunal, which I have been at pains to set out above, that he would look after his parents and keep them in his house. Indeed he has gone so far as to swear on oath in his affidavit of 7.3.96 (p50) to that effect. It would, therefore, seem that the test of viability - if test there be - is satisfied in this case, as at 28.11.95, and I see no reason, having regard to the length of residence from 20.6.93 to 11.10.94, that I should assume it was not immediately before his departure on that latter date.

13. My decision is therefore as set out in paragraph 1 above.

(Signed) J M Henty
Commissioner

(Date) 07 APR 1997